Status of Taiwan Under International Law

TAKANORI OJI

I. History of Taiwan as a "Territorial Possession"

Taiwan refers to a total of 87 islands-the main island of Taiwan and the numerous islets surrounding it.[1] The present Gaoshan tribes, referred to as the aborigines, are a subgroup of the Malays. By the beginning of the 17th century, they had divided into many tribes that inhabited the main island of Taiwan as well as the smaller islands. European missionaries had settled along Taiwan's western coast by this time and, according to the Scottish missionary, D. Wright, 11 distinct political units existed among them.[2]

The Dutch occupied the Pescadores in the Taiwan Straits during this period and constructed a fort, but this situation proved to be intolerable to the Ming Court, which subsequently persuaded the Dutch to remove themselves to the occupation of Taiwan on condition that they withdraw from the Pescadores. Under this agreement concluded between the Ming and the Dutch in 1624, the decision was that the Ming Court would not raise objections to

the Dutch occupation of Taiwan. This event is regarded as marking the advent of modern national sovereignty in Taiwan.[3]

The Dutch constructed Fort Zeelandia in Anping, which became the site of their Taiwan government office, and stationed a Governor and Director of the State of Tayouan and Formosa. They relocated their main base to Fort Providentia in Tainan on its completion. During this time, Spain was penetrating Asia, which brought it into conflict with the Dutch. Earlier, Spain had placed the island of Luzon under its dominion and, consequently, would not let the Dutch go unchallenged in Taiwan since Taiwan was located along the Spanish trade routes with Japan and the Ming Court. Two years later, in 1626, Spain established Fort San Salvador along Taiwan's northern area of Keelung, and area that was not under Dutch government control ; and three years later, in 1629, they constructed Fort San Domingo in Tamsui. Spain established a Governor's Office at Fort San Salvador and placed it under the jurisdiction of the Governor-General of Manila. Including the Pescadores as a "possession" of the Ming Court, there were three sovereign states exercising territorial possession of Taiwan during this period.

As to be expected, the Spanish advances into Taiwan were challenged by the armed resistance of the Dutch and the two nations repeatedly engaged their fleets in sea battles until 1642, when the Dutch ultimately succeeded in driving Spain out of Taiwan. Meanwhile, on the mainland of China, the Ming dynasty was destroyed by the Ch'ing, but in 1661, Koxinga[a] of the Ming

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[a] Koxinga is the popular English rendition for Cheng Ch'eng-kung. His mother having been Japanese, he is immortalized in a Japanese *Kabuki* play, *Kokusenya Kassen,* dating back to 1710, and introduced in English by Donald Keene, "Battles of Coxinga," another version of his name.

led a naval force to seize Fort Providentia and succeeded in placing it under his control that same year. The Dutch finally surrendered the following year and ended their 38-year rule in Taiwan.

As a result of Koxinga's occupation of Taiwan, Taiwan was unified under a single administration for the first time with both the main island of Taiwan and the Pescadores under one polity. The administration of Taiwan under Koxinga objectively functioned as an independent state. First, the legal system was improved, then an administrative structure to exercise control over the people of Taiwan was established, and recognition as a state was manifested in its foreign relations. Examples attesting to this status as a state are plentiful, as evidenced in letters from the Dutch East India Company to Koxinga in which he is acknowledged as a monarch by the use of such titles as "King of Formosa" or "Your Majesty,"[4] and the use of phrases such as "in accordance with your country's laws" or "King of Taiwan" in diplomatic documents that functioned as contracts.

The Cheng dynasty was destroyed by the Ch'ing during the reign of the third-generation Cheng Ke-shuang[b]. In 1683, Taiwan was ruled by the Ch'ing and made to be a part of Fukien Province that was located across the straits. Taiwan-fu was subsequently established and the three counties of Tainan, Zhu-to and Fengshan were placed under it. District administrative organs were then repeatedly reorgnized and the status of the Pescadores was elevated to that of a county and, thereafter, it would always be an extension of Taiwan-fu.

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[b] Cheng Ke-shuang was the second son of Koxinga's eldest son, Chêng Ching. *Hummel, Arthur W., ed. Eminent Chinese of the Ch'ing Period. United States Government Printing Office. 1943. p. 111.*

In 1885, the Ch'ing separated Taiwan from Fukien Province and established it as a separate administrative zone to which was assigned the appellation, "Fukien-Taiwan Province." However, as a consequence of the Ch'ing-Japanese[c] Peace Treaty [Treaty of Shimonoseki] in 1895, the Ch'ing dynasty ceded Taiwan to Japan. The exchange of the instruments of ratification was completed and it came into force on May 8, 1895, the date that marks Taiwan's placement under the jurisdiction of Imperial Japan. However, issuance of the treaty in itself did not enable Japan to immediately occupy the island of Taiwan. Until this time, the Japanese military had only gone so far as to occupy the Pescadores. Even after the treaty went into effect, Japan did not immediately seize Taiwan and the old administrative organs of the Ch'ing continued to rule Taiwan as before. Thwarted by unrelenting anti-Japanese movements mounted by the Taiwanese, the actual transfer procedure was not carried out until June 2, aboard a ship, itself an unusual measure. During this interim bereft of effective authority, the island of Taiwan declared independence on May 25 and established the Republic of Formosa (the Taiwan Republic).[5] Taiwan, as Japanese territory notwithstanding, Japan's state power had no force; and albeit no longer Ch'ing territory, it was still governed by the Ch'ing-appointed local officials. It was in this environment that the island of Taiwan declared independence, hence the Republic of Formosa was legally declaring independence from Japan, but in reality, was declaring independence from the Ch'ing. However, if the Republic of

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[c] The conventional English term is "Sino-Japanese." However, "Ch'ing-Japanese" is the faithful translation of the Japanese term used *(Nisshin)* since it was during the reign of the Ch'ing dynasty, which identified itself as the Ch'ing state *(Shinkoku)* and not as "China" (the modern *Chūgoku).* For the sake of accuracy and clarity, "Ch'ing-Japanese" is used throughout the text.

Formosa were to be acknowledged as a "state," this would be for a 1-week period only, that time frame when the competing foreign powers were no longer present in the governed areas and which ended on June 2 with the arrival of the [Japanese] Taiwan Governor-General who was empowered to rule. Subsequent to this date, two "state powers" existed in tandem on the island of Taiwan-Japan's state power, with the *de jure* authority to claim Taiwan as a dominion under international law, and the government of the Republic of Formosa, which was not a recognized state. Such was the situation until the downfall of the Republic of Formosa on October 19.

It was at this juncture that Taiwan became a territorial possession of Imperial Japan *de jure* and *de facto,* although the Japanese military was not even able to suppress the sporadic resistance activities until November. In the year 1895, Taiwan began its existence as Japanese territory and would be ruled as a colony of Imperial Japan for half a century until 1945 with Japan's defeat in World War II, in which year, the Republic of China occupied Taiwan and continues to rule it to this day.

In this manner, beginning many centuries ago with the Military Inspectorate[d] in the Pescadores under the Yuan (latter half of the 13th century)[6], then with the Ming, the Dutch, the Spanish, the Dong-du or Ton-tu (Cheng dynasty), the Ch'ing, the Republic of Formosa, Japan and the Republic of China, Taiwan has been ruled partly or wholly by each of them in their turn.

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[d] Military Inspectorate, subordinate to the regular military hierarchy, were primarily located in frontier areas and most units of territorial administration, responsible for local militia training, suppression of banditry, etc. *Hucker, Charles O., A Dictionary of Official Titles in Imperial China. Stanford University Press. 1985. p. 254.*

II. Succession of the state and Territoriality under International Law

Before proceeding with the main subject of this section, the succession of the state, the meaning of the word "occupation" under modern international law needs clarification. Occupation is a method to establish territorial acquisition to land that is ownerless and to control it with force ahead of any other state. The ownerless land that is the object of occupation cannot already be within the domain of any state, although this is not to imply that the land is necessarily devoid of inhabitants. In order to occupy the ownerless land with efficacy : a) First, for the state to effectuate occupation, it must demonstrate, in some manner, its intent to establish territorial possession of the land. In this sense, if a private individual who has no official affiliation to a state were to conduct such actions in the name of a state and demonstrate intent to take possession, this would not constitute occupation. b) Second, the state must occupy the land with efficacy. To occupy with efficacy means that the state that is effectuating occupation, indeed, has the power to enforce its authority throughout this region. However, the determinant factors for efficacy in occupation are contingent on prevailing endemic circumstances and elude definitions that are based on generalities. A case in point is land that is difficult to settle, where regular inspection tours or such measures as the periodic deployment of governmental bodies, might suffice. However, purely symbolic actions such as the hoisting of a national flag are not considered to be occupation with efficacy. Should a state achieve the above two actions ahead of any other state, its occupation of the region is deemed to be established and the territory is secured as the territorial possession of said state.

From the standpoint of "occupation" and "nation formation," Taiwan, partly or wholly, has been made the inherent territory of

the Yuan, the Ming, the Republic of Holland, the Spanish Empire, the Dong-du and the Republic of Formosa ; but do these historical territorial relationships indeed succeed each other? By what states were each of these states succeeded, and are these states in existence today? These questions are explored in the context of the principles of international law.

First, if territory is legally transferred to another nation, the former possessor nation forfeits its rights to said territory as well as its otherwise inherent right to seek retrocession thereof. The Spanish Empire was defeated by the Dutch Republic in the war to colonize Taiwan and its colony in northern Taiwan was subjugated by the Dutch Republic in 1642. Until such time that wars of aggression were treated as illegal acts, subjugation was recognized as a legitimate method for the appropriation of territory. At least during the 17th century, it was recognized as being entirely valid and, therefore, the transfer by Spain of its territorial sovereignty over Taiwan to the Dutch should be understood as lawful. Accordingly, this would apply to the ceding of the island of Taiwan by the Dutch Republic of Koxinga, based on a treaty. Therefore, both the Spanish Empire and the Dutch Republic forfeited their territorial rights to Taiwan and, regardless of what states might have legally succeeded them, such states henceforth have no inherent authority to make assertions on matters that are in any way related to territorial rights to Taiwan.

Second, since the state has fallen, the entity empowered to assert territorial rights itself is extinguished and its relationships to its possessions ceases to exist from that moment. The peoples of a vanquished nation might cry out in protest to "restore the nation," but this matter falls in the realm of politics, and the success or failure of their efforts generally rides on the question of power relationships as the matter does not concern international law. Dong-ning was subjugated by the Ch'ing, and the Republic of Formosa by Japan, consequently, these states had their territorial rights to Taiwan extinguished. Similarly, the Yuan were subjugat-

ed by the Ming, and the Ming by the Ch'ing, and they are now dead states. For this reason, no entity exists through which the Yuan or the Ming can assert territorial rights over Taiwan, ipso facto fundamentally no argument can be entertained that speaks of Yuan or Ming territorial rights to Taiwan. However, the reality is that this argument that Taiwan had been a possession of the Yuan and the Ming (for the sake of accuracy, it would only be the Pescadores) is used as one basis for the assertion that "Taiwan is inherently Chinese territory and therefore should be China's territory." This assertion rests on the notion that "China" has continued unbroken as "a single state" since ancient times with the Yuan succeeded by the Ming, the Ming by the Ch'ing, the Ch'ing by the Republic of China, and the Republic of China by the People's Republic of China. The natural conclusion, according to this line of argument, is that the territories of the Yuan and the Ming are to be succeeded by the Republic of China and the People's Republic of China.

There are significant problems with this development in logic. The use of the appellation *Chūgoku* ["Center Country" or "China"[e] in English] to signify a nation came about towards the latter part of the Ch'ing dynasty in the wake of the birth of Chinese nationalism during that period. In ancient times, the people of the Yellow River basin believed that the place where they lived was "the center to which the quintessence of the world drew together like a gathering cloud," it was "the center of the world" and, hence, the "Celestial Empire" or "Center Country," and the dynasty

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[e]"China" in English fails to convey the meaning of the two Chinese ideographs composing *Chūgoku,* which literally translates into "Center Country," "Central Country" or "Middle Kingdom." "China" is derived from the Persian and Sanskrit word "cīnāh," based on "Qin," the name of the home state that produced the First Emperor in 221BC. *American Heritage Dictionary. Third Edition. Houghton Mifflin Co. 1992.*

was the "Tian-Chao" [Celestial Dynasty], or the "Zhong-Chao" [Central Court]. There were other countries in the world, but they were not regarded as the equals of the "Center Country," and were treated as mere organized bodies that had been granted the privilege of paying tribute to the "Tian-Chao." Furthermore, this privilege to pay tribute was even denied to certain countries. The "Center Country" had an existence that transcended the affairs of the remaining world and, in order to express this meaning that it was the "center of the world," perhaps there is no appellation more glorious than "Center Country." Consequently, the imperial states that emerged on the Asian continent each vied to become the "Center Country." "Center Country" was not the name of a "country," but was rather more a symbol or a title for the subjugating rulers, each of whom had a separate and distinct name for their respective home states. The various races and tribes, each based in their respective home states, then enlarged their territorial boundaries by a continuous process of subjugating other states and, when their state achieved a level of great power, they declared themselves to be "the center of the world." Therefore, inasmuch as this "center of the world," or "Center Country," was temporal, it could be conquered by an enemy of foreigners, the Barbarians, and suddenly find the situation inverted as the enemy country established itself as "the center of the world" or "Center Country."

This "Center Country" was not the one, single nation that comes to mind when we speak of "China" today. Should "China" have been one, single country perpetually in an unbroken line and the sudden rise and ruin of successive dynasties been nothing but political changes of administration, how could we then appreciate the anguished swan songs that punctuate the epochal demise of dynasties as a dynasty's last retainers lamented over the "death throes" of their "country"[7] Indeed, the Republic of China and the People's Republic of China today each claim that they are "China." In effect, each asserts that they are to succeed the

territory that was "China" from times past, and each uses this as one of their arguments on which to base their territorial rights to Taiwan.

III. Disposition of Taiwan After World War II

When nations reach an agreement on a particular matter, the Heads of Government or comparably ranking politicians or government officials often collaborate to make their views known publicly both at home and abroad. There are cases in which they do not expressly attach a title to their announcement and there are instances where they do by employing such terms as **STATEMENT, JOINT COMMUNIQUE, PROCLAMATION** or **DECLARATION.** In all these cases, the will of the governments is expressed and, as such, the term serves to bind the concerned nations in some manner. Yet, with the exception of **DECLARATION,** the extent to which each of these terms binds the nations is often left unexplored. However, to then regard **STATEMENT, JOINT COMMUNIQUE** and **PROCLAMATION** all as **DECLARATIONS** and to make a cursory judgement that all have the efficacy of treaties or international agreements that have the efficacy of treaties, would be to leave the subject wanting. An examination of the Cairo Declaration and the Potsdam Declaration, to which Japan was obliged to consent at the conclusion of World War II, is germane at this point.

Neither of these documents is a **DECLARATION** in a strict definition of the term. The Cairo Declaration originally did not have a title, but if pressed to apply one, perhaps Cairo Statement would be more accurate. Similarly in the case of the Potsdam Declaration, it is a **PROCLAMATION** rather than a **DECLARATION.** Its formal title is, "A Proclamation by the Heads of Government, the United States, the United Kingdom, and China." The appropriate abbreviated title would be, "Potsdam Proclamation." Treaties or international agreements with the virtual

efficacy of treaties use several designations, ranging from **TREATY** to **MEMORANDUM,** but no scholar of international law would regard a **STATEMENT** or **PROCLAMATION** to be a **TREATY.** In the case of a **DECLARATION,** there are instances where it carries treaty-level efficacy, and the rights and duties of the related nations is prescribed. However, insofar as the Cairo Declaration is concerned, it does not prescribe a relationship of rights and duties between the Allied Powers, but it is an expression of their intent and policies. In fact, the view of the governments of the two nations that announced this statement--the United States and Great Britain--was based on this understanding. In any event, Japan consented to the Potsdam Proclamation on August 15, 1945, and it had no binding power over Japan until the day that Japan signed the Instrument of Surrender.

An instrument of surrender does not execute the final settlement of a war. The convention is that the victorious and the vanquished nations use the instrument of surrender as a basis from which a peace treaty is concluded, and it is through the peace treaty that the rights and duties of both parties are legally established. The treaty becomes legally binding only after the signatory nations fulfill the procedures and the treaty goes into force. The articles agreed upon at the time of surrender lose effect when the peace treaty goes into force, and the new set of articles agreed on in the peace treaty then apply anew. In essence, the instrument of surrender is not the final settlement of a war ; the final settlement must wait for the conclusion of a peace treaty. When Japan signed the Instrument of Surrender, it consented thereby to the Potsdam Proclamation and, henceforth, was to assume its obligations as prescribed therein. However, specifically in regards to its territory, Japan agreed to divest itself of the South Sea Islands, to restore Manchuria and Taiwan to the Republic of China, and to remove itself from all regions it had occupied (Cairo Statement). It agreed that the confines of its territory would be Honshu, Hokkaido, Kyushu and Shikoku as

well as other minor islands as determined by the Allied Nations (Potsdam Proclamation, Article 8). However, the terms of surrender to which the vanquished consents at the peace talks are not always equal to the demands of the victor. Granted that negotiations tend to lean in favor of the victor, an argument can be made in the case of Japan that it was an example of an unusual and opposite set of circumstances. The worldwide scale of the Cold War led to a breakdown in the unity of the victor nations, as a result of which the reparations issue developed in a manner that was advantageous to Japan. The Potsdam Proclamation does not permit "those industries which would enable her to re-arm for war," and only permits Japan "to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind." This can clearly be understood as actual reparations having been anticipated ; nonetheless, such provisions are not set forth anywhere in the Peace Treaty. The enormous industries in Japan today, which potentially can be converted for military use, could not possibly exist had the articles of the Potsdam Proclamation been carried out and incorporated into the Peace Treaty. Concretely, on the matter of reparations, the victor nations basically waived the reparations with the San Francisco Peace Treaty[f] with regards to Japan. The Republic of China had been unyielding in its demand for reparations, but had to abandon them under its peace treaty with Japan. The People's Republic of China also abandoned its "demand for war reparations" by the joint statement it issued with Japan in 1972. In effect, it is not the instrument of surrender that has the final binding power between

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[f] The formal title in English is listed as "Treaty of Peace with Japan, San Francisco, 8 September 1951," but is referred to in this text as "San Francisco Peace Treaty." *The Major International Treaties Since 1945. Grenville, J. A. S . and Bernard Wasserstein. Methuen & Co., 1987. pp. 55-57.*

the concerned nations regarding their rights and duties to each other, but rather it is the conclusion of a peace treaty that legally establishes these relationships of rights and duties between the belligerent nations after many negotiation sessions where each side negotiates from its respective position in the international environment. To reiterate, the conditions to which the defeated nation consents at the time of its surrender to the victor nation become a nullity, and the terms stipulated by the peace treaty are the newly established relationship of rights and duties between these treaty nations. Therefore, the instrument of surrender is not the final disposition of a war, but it is the peace treaty that assumes this task. In other words, the change in the territorial status of Taiwan under the Potsdam Proclamation should be seen as having been vacated with the conclusion of the Peace Treaty.

The following is an examination of the provisions under the San Francisco Peace Treaty with regards to territorial changes. In principle, the state is vested with the ultimate right with regards to its own territory. In exercising this right, the state is not limited to the governance and use of the land, but can also cede, surrender or lease its lands. Japan owned the right to cede or surrender Taiwan precisely because Taiwan was a possession of Japan. In the San Francisco Peace Treaty, Japan's disposition of Taiwan assumed the form of a "renunciation." In this manner, Taiwan was split off *de jure* from Japan's sovereignty.

However, if at the time that Japan is renouncing its territories, another nation has already set foot on its lands prior to the the San Francisco Peace Treaty's coming into force, do the areas in question automatically become the territories of that other nation as a result of Japan's renunciation? Specifically, by Japan's having renounced these territories, can it be construed that Japan renounced them to that nation which had set foot on its lands? In addition to Taiwan, the territories renounced by Japan include *Chōsen* ["Korea"] and the Kurile Islands-Sakhalin, the legal character of the latter not necessarily identical to that of

Taiwan's. In the case of *Chōsen*[g], no country by that name existed prior to, or even after, the conclusion of the San Francisco Peace Treaty. Chapter II , Article 2(a) of the Peace Treaty states that "Japan, recognizing the independence of Korea," by which is meant that Japan recognizes the separation of *Chōsen* from Japan and that Japan will not object to the establishment of an independent nation nor to independent nations already in existence in this region. In this passage, Japan clearly states its renunciation of *Chōsen,* but it is not necessarily that Japan is renouncing *Chōsen* to the nation of *Chōsen.* With regards to the concerned nations of the Republic of China and the USSR, each unilaterally incorporated formerly Japanese land into their own territory. In this respect, the two cases are the same. They are also identical with respect to the San Francisco Peace Treaty in that neither was a party thereto. Therefore, both cases can be examined in the same manner. In effect, the USSR incorporated the Kurile Islands and Sakhalin into its own territory, and the Republic of China incorporated Taiwan. It was after these actions that Japan renounced these regions by means of the San Francisco Peace Treaty. However, treaty provisions regarding the renunciation of these territories cannot be invoked as the basis for each of these nations' assuming legal sovereignty over said territories. In examining the question of territorial rights to Taiwan, the latter part of Article 26 of the Peace Treaty is used for reference :

"Should Japan make a peace settlement or war claims

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[g] The English term "Korea" may be a derivation of "Koryō" a state that existed between 935-1391. In 1897, King Kojong named his country the Taehan Empire. Then as a Japanese protectorate, Japan referred to it as the *Kankoku Tōkan Fu* or Office of the Resident General of "Korea" in 1906. Annexed in 1909, the office was replaced with the *Chōsen Sōtoku Fu* or Government-General of "Korea" in 1910. *Kodansha Encyclopedia of Japan. Kodansha. 1983. pp. 278-283.*

settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty."

According to the Treaty, there was no nation that assumed Taiwan upon its cession. Therefore, if Japan, subsequent to the Peace Treaty, concludes a peace treaty with a nation in ceding Taiwan, this act would be in violation of the above quoted passage and the signatory powers could demand that Japan extend "those same advantages" to them. It is precisely for this reason that the peace treaty between Japan and the Republic of China, which was concluded just prior to the coming into force of the San Francisco Peace Treaty, does not contain any provision that might violate this passage and, similarly, the peace treaty between Japan and the People's Republic of China could not contain such provisions.

With regards to the disposition of Taiwan by Japan, regardless of the restrictions imposed by the latter part of Article 26 of the San Francisco Peace Treaty, this treaty had not come into force when Japan and the Republic of China concluded their treaty of peace. Therefore, actual issues aside, at the time that the Japan-ROC Peace Treaty was being signed, Japan held the legal right to the disposition of Taiwan, but express provisions for Taiwan's "return to the Republic of China," or "cession to the People's Republic of China" are absent in the body of this treaty. The treaty between Japan and the ROC was signed 7 hours 30 minutes before the San Francisco Peace Treaty came into force. Therefore, insofar as this was the case, Japan was not bound by the San Francisco Peace Treaty and Japan stood where it was before it renounced Taiwan, i.e., it had possession of Taiwan once again and, in addition, it had the right to Taiwan's disposition. Despite this situation, the treaty between Japan and the ROC did not address any active measures for Taiwan's disposition and only went as far as confirming the provisions of the San Francisco

Peace Treaty.

Article 2 of the treaty between Japan and the ROC merely indicates, in effect, "approval of the renunciation" of Taiwan "based on the Treaty of Peace with Japan, Article 2," and it does not newly establish any provisions for the renunciation of Taiwan. In effect, the treaty between Japan and the ROC does not embody Japan's renunciation of Taiwan, but it only serves to give approval to Japan's renunciation of Taiwan as embodied in the San Francisco Peace Treaty. On this point, Mr. Wajima, the Director of the Asian Affairs Bureau of the Japanese Foreign Ministry, during the deliberations in the Diet regarding the treaty with the ROC, made a statement at a meeting of the Lower House Foreign Affairs Committee to the effect that the question of Taiwan's "reversion is undetermined."[8] The ROC expressed no opinion on this matter and followed Japan in endorsing the treaty. Therefore, we would have to conclude that even if this issue is considered in the context of this development and the principles in the interpretation of the treaty, Taiwan's reversion remains legally undetermined.

With the coming into force of the peace treaty between Japan and the ROC, the state of belligerency between the two nations came to an end and peace was restored. Regardless of what might have been included in the instruments of surrender that Japan signed, Japan was not obligated to implement them if they were not prescribed in the peace treaty at the time of its coming into force. The duty to which Japan was bound to return Taiwan to the ROC did not exist according to the Cairo Statement and the Potsdam Proclamation's terms of surrender, and Japan's renunciation of Taiwan as set forth in Article 2 of the San Francisco Peace Treaty was "approved" by Japan together with the ROC under Article 2 of the Japan-ROC Peace Treaty and, thus, was satisfactory to the ROC in this form.

IV. Efficacy of the Ch'ing-Japanese Peace Treaty [Treaty of Shimonoseki]

As previously mentioned, at the time that the Japan-ROC Peace Treaty was concluded, the Chinese Nationalist Party had moved its administration to Taiwan and designated Taipei as its capital after its defeat to the Communist Party in the internecine war. On the international stage, the Cold War between the U.S. and USSR was in full swing and, in January 1950, the U.S. announced its Non-Intervention in Taiwan Statement with the looming threat of an invasion of Taiwan by the People's Republic of China. However, in June of the same year, the Korean War broke out and President Truman with haste ordered the U.S. Seventh Fleet to defend Taiwan and the Statement on the Neutrality of Taiwan was issued. In this statement, the issue of who holds title to Taiwan is treated as yet an unsettled issue and the determination of Taiwan's status was postponed and was to be addressed in the peace treaty with Japan or by a decision of the United Nations. Thereafter, the argument that Taiwan is of undetermined legal status, which lies at the heart of this statement, has been maintained for over 20 years. This is generally interpreted as an attempt to prevent the People's Republic of China from taking over Taiwan as well as to shut it out from being seated as a permanent member of the UN Security Council.

The Nationalist government issued its Statement of Neutrality through its Director of Foreign Affairs, Kung-ch'ao YEH, and has accepted the gist of the statement in principle. However, it presented two qualifying points.

1. It would not affect the decisions of the Cairo Conference with regards to the Chinese government's sovereignty over Taiwan or the status of Taiwan.
2. It opposes international Communism and it would not

affect China's position to protect the territorial boundaries of China.

Therefore, the Nationalist government did not oppose having the issue of title to Taiwan remain an undetermined issue. However, because the logical conclusion to this "undetermined" argument also fundamentally denies Taiwan's governance by the Nationalist government, outwardly it opposes the argument that title to Taiwan is undetermined. The rationale is that the Nationalist government's territorial rule is limited to Taiwan, which means that if its basis for controlling Taiwan is lost, its very existence as a state is jeopardized. Despite these circumstances, the Nationalist government tacitly approved of Taiwan's "undetermined status" or, rather, had no other alternative. The reason for this may be twofold. First, insofar as Taiwan's legal status is "undetermined," any armed invasion by the People's Republic of China can be judged by the U.S. to be an "act of aggression," thereby providing the Nationalist government with a convenient means of defense. Second, the ROC controls Taiwan immediately and this control is neither excluded nor denied by Taiwan's "undetermined" status and thus poses no decisive threat. In the context of these developments, the ROC did not particularly oppose the policy of an "undetermined status" for Taiwan that was sought by the U.S., although occasions for determining Taiwan's status were propitious during the San Francisco Peace Treaty negotiations and again during the Japan-ROC Peace Treaty negotiations. Outwardly, the ROC represents a "single China" and, on occasion, it has had to claim its sovereignty over Taiwan if only because Taiwan is virtually the only territory under its control. In addition, the People's Republic of China has consistently opposed this "undetermined status" for Taiwan on grounds that the original purpose for this classification was to prevent it from claiming territorial rights to Taiwan.

Since both the ROC and the People's Republic of China assume the position of a "single China," the bases on which they

each oppose Taiwan's "undetermined status" are substantially similar. Among their claims are a few that are problematical under international law, but in this section we will explore the argument that the Ch'ing-Japanese Peace Treaty, the basis for Japan's territorial possession of Taiwan, is a nullity.

Both the Nationalist government and the People's Republic of China base their claims to having territorial rights to Taiwan on the aforementioned Cairo Statement, Potsdam Proclamation and Japan's Instrument of Surrender, where inferences are made to "territory seized from China by Japan." and Whereas there was a declaration of war against Japan on December 9, 1941, the Ch' ing-Japanese Peace Treaty [Treaty of Shimonoseki] that constituted the basis for Japan's territorial rights to Taiwan, was renounced and nullified and, therefore, it is only natural for the ROC to reassume its sovereignty over Taiwan.

What is the popular view on this point according to international law? A treaty that establishes territorial cession is rarely concluded unilaterally as the norm is to do so by means of articles in a peace treaty. So it is in the case of the Ch' ing-Japanese Peace Treaty wherein territorial cession is one of its articles. Such an article: a) is a treaty that creates, stipulates and declares what the permanent rights and circumstances are to be and it is called a treaty of disposition; b) has as its objective a specific one-time indemnity or action; and c) following the fulfillment thereto, it is called a consummated treaty. Examining the Ch'ing-Japanese Peace Treaty in this context, the only article which does not fall under the category of articles of disposition is Article 6, and the other articles are all articles of disposition.

It is often the case when nations initiate a state of belligerency, that statements are issued to renounce hitherto existing treaties with the nations with which it is engaged in war. When China declared war against Japan on December 9, 1941, its statement to the effect that it "categorically renounces all treaties, agreements, and contracts in any manner associated between China

and Japan," is particularly consistent with this. In the context of international law, are all treaties nullified by statements renouncing hitherto existing treaties if they are issued together with declarations of war? Opinions on this matter are mixed and the most representative of the majority views are examined.

1. All political treaties not establishing permanent circumstances are nullified, e.g., treaties of alliance.
2. All non-political treaties not establishing permanent circumstances not necessarily nullified, but can be renounced or terminated at the discretion of the treaty nations, e.g., treaties of commerce.
3. Treaties establishing permanent circumstances, regardless of whether or not they are political treaties, are not necessarily nullified. After the war is concluded, the victor nation can append revisions to these treaties in its peace treaty or dissolve them.

In the postwar period, the ROC made it understood through Article 4 of the Japan-ROC Peace Treaty that all treaties, pacts and accords previously concluded between Japan and China were nullified as a result of the war. This is to say that the ROC, by means of the Japan-ROC Peace Treaty, regards treaties concluded between Japan and China prior to December 9, 1941, as having been nullified "as a result of war"-the ROC is not asserting that these treaties were nullified at the moment that war was declared. Therefore, it follows that the parameters of treaty abrogation should be interpreted in the context of general international law and, in so doing, only Article 6, which is not an article of disposition or an article of consummation, was in fact nullified, and the remaining articles should be regarded as not having been affected by the war and the legal circumstances established by them prevail in perpetuity.

Justice Kizaburo YOKOTA, in effect, said the following in reference to consummated treaties:

"As in the case of treaties on the cession of

territories where permanent circumstances are to be established, these rights and duties refer to the duty on the part of a certain concerned nation to cede a certain territory to the other concerned nation and the right of this latter concerned nation to demand that this duty be carried forth. When this cession is in fact effectuated, this duty is fulfilled and is extinguished. Concurrently, the right to make demands on this duty is also extinguished. Therefore, it would have to be said that the treaty also is no longer viable. Naturally, as a result, the issue of cession is nullified, and it is not that a nation is retroceding territory that it once acquired by cession back to the nation that had ceded it."

Accordingly, he asserts that when the treaty of disposition is consummated, its objectives have been achieved and it is extinguished, which precludes any statement pertaining to treaty nullification.

E. Lauterpacht also extends his views to the effect that :

"According to international law, a nation that has previously ceded territory to another country based on a treaty cannot make claims to this territory to take it back with a simple, unilateral declaration. Therefore, the unilateral statement issued by China in 1941 to annul this treaty (Ch'ing-Japanese Peace Treaty) cannot be invoked to say that it has taken back these territories (Taiwan), and neither can it do so."

Lord McNair refers to the Treaty of Versailles to illuminate the question of treaties of disposition. On July 1, 1890, Great Britain ceded Heligoland to Germany based on a treaty between them as well as adjusting the boundaries that demarcated the reach of each other's forces in Africa. In the ensuing period of World War I, the two faced each other as belligerents, but the articles composing the treaty of disposition remained unaffected by

the state of war. At the conclusion of the war, the cession of Heligoland was settled anew under Article 115 of the Treaty of Versailles and the determination was made that it would be a possession under Great Britain once again. However, this is a consequence of an entirely new decision and not the result of Great Britain's having issued a unilateral notice of abrogation. In this manner, the popular view of international law holds that articles of disposition are not subject to abrogation once they have been carried out, but that a new treaty needs to be drafted if there is to be a change in the prevailing state of rights.

The next question that begs to be asked is what are the assertions of the People's Republic of China and the ROC? It has already been stated above that a treaty is not nullified in its entirety due to the outbreak of war between the countries that are the parties to the treaty. For this reason, it was common for belligerent nations to give notice to the effect that a previously concluded mutual treaty had been abrogated as an incidental to their statement of a declaration of war. The declaration of war issued by the ROC against Japan in which it specifically stated that it, in effect, "categorically nullifies all treaties, agreements, and contracts that are in any manner related to relations between China and Japan" exemplifies such a case. From the standpoint that it is the successor to the government of that time, the People's Republic of China also endorses the statement and asserts that the Ch'ing-Japanese Peace Treaty has already been nullified. The views of these two governments are not always in agreement, but their salient points are as follows:

A) Assertion representative of the People's Republic of China

The archetype of their view is the argument espoused by Ru-An MEI[9] to the effect that "The basis of Japan's territorial possession of Taiwan is the Ch'ing-Japanese Peace Treaty, which is the result of the Ch'ing-Japanese War. Therefore, Japan lost its basis

for territorial possession of Taiwan at the moment the statement that nullified this treaty was issued. During the Japanese War in China [1931-1945], Taiwan was in reality under Japanese occupation. However, as of the day that war was declared, China had the right to claim that its sovereignty over Taiwan was restored."

B) Assertion representative of the Republic of China

The views of the Nationalist government are best articulated by the arguments of Shi-zhen ZHANG, Hon-da QU, and Yu-Qin CHEN[10] to the effect that "Since the day that war was declared, the status of Taiwan was fundamentally altered according to jurisprudence. China no longer acknowledges Taiwan's cession to Japan. Taiwan is a part of China."

Both of these assertions rely on "the day that war was declared" to determine the date when the treaty nullification went into effect. However, Article 4 of the Japan-ROC Peace Treaty expressly states that it was "the result of war." The treaty between China and Japan was not nullified by the intentions of the ROC that were incorporated in its statement to nullify the treaty with Japan, which formed a part of the ROC's declaration of war against Japan, but that it was "the result of war" between the two countries. Even the ROC has had to acknowledge that this is the case.

What then are the legal ramifications of this statement to nullify the Ch'ing-Japanese Peace Treaty? This issue is explored by examining the assertions put forth by the two China's, the aforementioned popular views of international law, and concrete examples from the past. First, although Japan had to recognize the nullification of past treaties under Article 4 of the Japan-ROC Peace Treaty that was concluded between, Japan and the ROC government after the war, the question arises as to the actual legal effects it has on the Ch'ing-Japanese Peace Treaty wherein territorial cession is stipulated.

First, according to the aforementioned popular views of international law, articles of disposition and articles of consummation are obviously not affected by declarations of nullification. Specifically, only Article 6 (article of commerce) of the Ch'ing-Japanese Peace Treaty is no longer valid.[11]

Second, the legal circumstances created through Article 2 of the article of territorial cession continue to prevail because its implementation has been consummated. Therefore, in order for China to have possession of Taiwan-specifically, in order to change the legal situation that "Taiwan is Japanese territory"--it goes without saying that a new legal settlement needs to be drafted.

Third, both the ROC and the People's Republic of China recognize that each of the articles in the Ch'ing-Japanese Peace Treaty, which is a consummated treaty, cannot be regarded as items that are subject to abrogation. The grounds for this argument is that neither the ROC nor the People's Republic of China has ever denied Article 1 of the Treaty, the provision that stipulates the recognition of *Chōsen* ["Korea"] as a fully independent country, because to do so is to assert that *Chōsen* ["Korea"] revert back to its status as a dependency of China, which neither has ever claimed. In addition, if the nullification of the Ch'ing-Japanese Peace Treaty were to serve as the grounds for changing the citizenship of the Taiwanese people, the logical extension would be to use December 9, 1941, as the start-date for the change to take legal effect. However, the Nationalist government has set October 25, 1945, as the start-date--specifically, the date on which it actually implemented its control over Taiwan-while Japan believes it is the date on which the San Francisco Peace Treaty was issued or the date on which the Japan-ROC Peace Treaty was issued. Furthermore, neither the ROC nor the People's Republic of China has ever asserted that due to the abrogation of the Ch'ing-Japanese Peace Treaty, Japan should return the 200,000,000 taels it received as indemnities under the provisions of Article 4 of this treaty.

Even for cases other than the Ch'ing-Japanese Peace Treaty, Japan has not been imposed upon to return payments it received through past agreements or treaties with China. Examples include the Ch'ing-Japanese Agreement of 1874 where the Ch'ing paid 500,000 taels to Japan for the cost of dispatching troops to Taiwan, and the Hsing Ch'ou Treaty [Boxer Protocol] of 1901 where Japan had already been paid 7% (34,790,000 taels) of the total 450,000,000 taels despite the fact that this treaty was nullified in accordance with the San Francisco Peace Treaty as stipulated in Article 5 of the ROC-Japan Peace Treaty.

It is evident from the aforementioned that the legal effects of the articles of disposition and the articles of consummation continued to prevail and that the declaration on the nullification of the Ch'ing-Japanese Peace Treaty was not applicable to these articles. Insofar as articles of territorial cession are articles of disposition or consummation, legal settlements must be made anew in regards to the return of these territories.

The efficacy of treaty nullifications based on the above declarations of war has been considered, but one other assertion made by China regarding its possession of Taiwan will be investigated. This is the opinion that the Ch'ing-Japanese Peace Treaty was concluded not under the free will of the Ch'ing dynasty, but under threat. The efficacy of treaties made under threat is examined below.

It is a widely held belief that under international law, a country can claim the invalidity of the signature that is affixed for the purpose of concluding a treaty if its individual treaty delegate was forced into agreement thereto by means of fear, violence or confinement, which are deemed to vitiate the treaty. If said treaty does not require ratification procedures for the initiation of its efficacy, then the party who was the subject of the threat can claim the invalidity of said treaty on grounds that threat, in fact, was applied. If ratification is required, then this treaty can be vetoed by means of rejecting its ratification.

Moreover, where a treaty requires ratification, the invalidity of a treaty can be similarly claimed if threat was applied to any individual who is a party to the ratification. Although an individual party is the subject of the threat, the injury caused to the law cannot be denied. However, the situation does not cause jurisprudential damage if the subject of the threat is not a delegate to the treaty conclusion or an individual party to the treaty ratification, for example, if the subject is a state. Concretely, cases where states were threatened with destruction by the use of armed forces advancing across rivers if the state failed to sign or ratify a treaty, have occurred from time to time in the usual environment of concluding a treaty and do not obstruct the jurisprudential validity of the treaty. Furthermore, where a state knowingly ratifies a treaty fully aware that its delegate to the treaty conclusion was the subject of acts of threat, the ratification under free will is deemed to counteract the act of threat perpetrated during subscription to the treaty, and the fact that threat was applied does not obstruct the validity of this treaty. To illustrate how these popular views of international law apply to the Ch'ing-Japanese Peace Treaty, the following concrete examples are given.

First, in the development of the peace negotiations, talks were initiated in Shimonoseki on March 29, 1895. At the time, Japan and the Ch'ing were at war with each other and the Japanese forces had landed on the Pescadores on March 23, from where they could make a push for Peking from both Manchuria and Shantung. LI Hung-chang felt that the fall of Peking was imminent if Japan's demands were not swallowed. Although the threat of a military assault by Japan was clearly evident, the threat was posed against a state as well as having been an act that arose during a state of war and, therefore, could not be held suspect of committing illegalities. In the course of the talks, LI Hung-chang extended a request to Japan for a détente and mitigation, but Japan's response was to threaten Li with

deliberately pitiless language. However, this threat was clearly posed against the state--for example, words to the effect that Peking would be seized by means of military action-and was not a threat based on the personal endangerment of Li, to his life, physical body or assets. Therefore, this case does not constitute a case of jurisprudential damage caused by a personal threat to the treaty delegate.

However, LI Hung-chang was also shot and injured by a hooligan sniper within the time frame that the talks were being held. In this case, the plenipotentiary to the peace negotiations between belligerent states was injured by a person of Japan, the adversarial state, in territory controlled by Japan under its exclusive state sovereignty over this territory and, indeed, while the peace talks were being conducted. The incident was a matter of great gravity and can only be described as containing all the requisite ingredients for it to be labeled a "threat to a plenipotentiary." Although the perpetrator's actions were not instigated by the state power, the state of Japan, nonetheless, cannot be excused from its responsibilities albeit the act in question was the act of an individual. However, the claim cannot be made that the Li Hung-chang incident vitiated the Ch'ing-Japanese Peace Treaty, thus invalidating it. The reasons are as follows.

First, the Ch'ing state itself did not treat this incident as a threat against Li and, despite sustaining bodily injuries and psychological distress, Li himself referred to it as an unfortunate happenstance. As for Japan, it had to make concessions as a result of the incident. The negotiations had been proceeding well for Japan from the start, but this incident forced it into making concessions and extending a formal apology to Li with words of sincere regret. It has been said that on accepting the apology, Li then used the incident to turn the tide and to give himself the advantage in the negotiations. This development is revealed in the telegram exchange between Li and Wei Men, Prime Minister of

the Ch'ing state. The formal telegrams do not contain language suggesting a denunciation of Japan for a violation of international law, but rather suggest an attempt to take advantage of this sniper incident to bring about a cease fire or a mitigation to the terms of peace. In this respect, it is very clear that China could not have claimed the invalidity of the Ch'ing-Japanese Peace Treaty based on this incident.

Second, even if we were to concede that this sniper incident was a personal threat to the plenipotentiary to the conclusion of the treaty, the Ch'ing state did ratify the treaty fully cognizant of this incident and, therefore, cannot use this incident to claim the invalidity of the Ch'ing-Japanese Peace treaty after the treaty was issued.

Third, during the time of the Ch'ing dynasty, the institution vested with the authority to ratify treaties was the emperor. There is no evidence that Emperor Kuanghsu was ever threatened by Japan during the period leading up to the ratification of the treaty and, therefore, the ratification of the treaty was based on the free will of the emperor of the Ch'ing state and claims of jurisprudential damage to the treaty and its consequent invalidity cannot be made on the grounds that a threat was leveled.

Below, the efficacy of a treaty resulting from an act that is unlawful under international law--a war of aggression--is examined.

The definition of war under international law is first considered. War is an armed conflict that is pursued by an expression of the will to engage in war and by an engagement therein pursuant to the rules of war as set forth by international law. With regard to an "expression of the will to engage in war," which stands as one condition to "war pursuant to international law," the commencement of hostilities must be based on either a declaration of war, or the dispatch of a final notification that incorporates a conditional declaration of war, in order for the state of hostility to fall under the purview of international law as can be seen in the third Hague Convention of 1907 (on the

commencement of hostilities). Furthermore, this is supported by customary international practice since it has also been the conventional custom in wars to have first pursued diplomatic bargaining, then based on the will to engage in war, to subsequently commence hostile actions.

On the question of the nature of war, since the time of Clausewitz, who is regarded as the father of international law, there had existed the doctrine of total war where a war that is waged for a specific goal is lawful and all others are unlawful. This can be seen in two of the treaties produced at the second Hague Peace Convention that prohibits several types of wars, as in the first treaty on the settlement of international conflicts and the second treaty on the resort to armed force for the purpose of recovering contractual responsibilities and duties. In 1929, the Antiwar Pact [Kellogg-Briand] was concluded to which Japan was an original treaty power and to which the ROC subscribed by the year's end. Article 2 of this treaty provides that international disputes should be resolved peacefully, and Article 1 prohibits the recourse to war for the settlement of disputes or as an instrument of national policy. Later, the United Nations Charter (Article 2) once again prohibits, in principle, the use of armed force in violation of the UN principles.

The nature of the Ch'ing-Japanese War is now considered in light of these rules of international law. The concept of war, rooted in Clausewitz' doctrine of total war as mentioned above, underwent changes with the march of time. The notion of war as illegal subsequently became the prevailing thought and with it was born the notion of the aggressor as that state which resorts to this illegal war. If Japan's actions on the mainland of China is to be regarded as the initiation of a series of acts of aggression, then the Ch'ing-Japanese Peace Treaty, indeed, is the result of a war of aggression that was forced upon the Ch'ing dynasty. However, this trend of thought is one emanation in the evolution of international law that accompanied changes in the world order following the

two World Wars with emphasis on the second. In former times, a war conducted under specific circumstances was legal-restrictions such as the foregoing regarding the conduct of war did not exist at the time of the Ch'ing-Japanese War.

It is clearly evident that if the Ch'ing-Japanese War were to be understood in the context of the above, that it would then be very difficult to rule that the war was an unlawful act under international law. First, this is because the start of the Ch'ing-Japanese War was the Korean Problem (Tonghak Uprising) and the real victim was *Chōsen* ["Korea"]. The Ch'ing-Japanese War itself was of a peculiar nature in that it was a war that was waged where "the stake was whether Japan or the Ch'ing would rise to imperialism or fall into vassalage as each jockeyed to become an imperialist state," if you will. When aggression is called into question in this case, it is an indisputable point that for *Chōsen* ["Korea"], the suzerainty of the Ch'ing stood to be as much an aggressor as Japan. Therefore, it is without reason to censure Japan for "aggression" simply because the result was that the Ch'ing were the defeated. Furthermore, the latter part of the 19th century was the heyday of imperialist expansion with numerous displays of armed force used to resolve conflicts and to carry out national policies. Such was wars were not the exception, but were plentiful up to the end of WW I. The Ch'ing-Japanese War took place at a time when international law recognized peace treaties concluded as a result of war whereby the defeated nation ceded territory, and this was considered to be fair and just. In addition, the ROC assumed the rights and duties of the Ch'ing regarding its diplomatic treaties including the Ch'ing-Japanese Peace Treaty, and never denied the efficacy of this treaty throughout the period preceding its declaration of war against Japan on December 9, 1941. As a case in point, during the 1921 Washington Conference, the issue of "China's territorial integrity" was deliberated, but there is no evidence that the ROC, which was a concerned nation, ever raised the territorial problem of Taiwan.

On the contrary, it reconfirmed the validity of the Ch'ing-Japanese Peace Treaty.

It also needs mentioning that the UN International Court of Justice's draft on treaty law is at most a draft that envisions the ideal in terms of international law and, at the present time, has not attained binding powers even among the members of the international community. At some point in the future, should this draft even attain binding powers by its subscription and ratification by a majority of states, it would still have no *ex post facto* binding powers with which to reject the efficacy of treaties dating back to the 19th century. In this sense, a one-sided designation of the Ch'ing-Japanese War as, in nature, a war of aggression is untenable.

Restoration of the status quo due to unlawful actions under international law is now considered. Restoration of the status quo is the reestablishment of conditions that existed prior to the discharge of the entire range of internationally illegal actions perpetrated to establish a state's responsibilities. Specifically, internationally illegal actions by a state must have existed as a precondition to claims for the restoration of the status quo.

"Restoration of the status quo" is one basis from which the ROC claims its possession of Taiwan. More specifically, the claim is that the Ch'ing-Japanese Peace Treaty and the Ch'ing-Japanese War, which was its cause, were internationally illegal acts. However, as stated in the foregoing, to the extent that the Ch'ing-Japanese Peace Treaty was not illegal, there is no basis from which to claim "restoration of the status quo." The argument that "restoration of the status quo" according to international law applies to territory including those occupied as a result of an illegal act is an indisputable point, but in the specific case of Taiwan, neither was it a region occupied by Japan as a result of WW II nor was it a region occupied by Japan as a result of the two "incidents" that occurred in the course of Chinese-Japanese relations in the 1930's. The basis on which Japan

discharged its sovereignty over Taiwan as its dominion was literally the Ch'ing-Japanese Peace Treaty and the article of territorial cession therein, and this is not problematical under international law.

The transfer of territory is limited to the two modes of cession by treaty or by restoration of the status quo. However, where the latter case is claimed, strictly speaking, it is limited to the "reversion of territory that was occupied by an unlawful act." With regard to territory that has previously been ceded by treaty agreements, new territorial transfer procedures by peace treaty agreements must be drafted. In this sense, the ROC's argument for "restoration of the status quo" is unavoidably absent of grounds in international law.

It is clear from the aforementioned that the argument calling for the nullification of the Ch'ing-Japanese Peace Treaty, which is put forth by the ROC and the People's Republic of China as one of the arguments related to the legal status of Taiwan, is without legal grounds and political claims cannot be made.

Japan had already discharged its territorial sovereignty over Taiwan legally at the point that the Ch'ing-Japanese Peace Treaty went into effect. Without a doubt, Taiwan was a Japanese possession up to the time that Japan relinquished its sovereignty over Taiwan with the Peace Treaty that followed WW II. There exists no grounds in international law for the unilateral abrogation of a consummated treaty clause on disposition by including it within a statement on the declaration of war. The transfer of territories requires a new settlement, as previously noted. However, in reality, there has been no legal settlement to date between the concerned nations regarding the territorial possession issue subsequent to Japan's relinquishment of its sovereignty. The question of jurisdictional title to Taiwan will continue to remain an issue, for inasmuch as the future resolution of the Taiwan issue is a formidable task, it is a true reflection of the antinomy between the legal theories of international law and the rapidly

changing situation in the international community.

V. Paradigms to the Resolution of Taiwan's "Territoriality Problem"

As stated above, in legal terms, jurisdictional title to Taiwan remains undetermined. However, a number of paradigms can be considered. First, where the problem is entrusted to the former Allied Powers as an integral part of the post-WW II disposition items, we find that the crucial scope of these "Allied Powers" is ill-defined.

In the forward to Japan's Instrument of Surrender is the wording, "which four powers are hereafter referred to as the Allied Powers…" and lists the nations as the United States of America, the United Kingdom of Great Britain, the Republic of China and the Union of Soviet Socialist Republics. However, there is a total of nine signatories that, in addition to the four, include the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of the Netherlands and New Zealand. Furthermore, preceding the signatures of the representatives of these nine nations is the signature of the Supreme Commander of the Allied Forces, General MacArthur, who accepted the surrender for the above four powers "and in the interests of the other United Nations at war with Japan." Thus the welcome mat is laid out for "other United Nations" to interpolate other nations as signatory nations despite the fact that they did not actually sign this instrument of surrender. In this manner, the actual number of "Allied Powers" as well as the Instrument of Surrender are obfuscated. Moreover, if the criteria is that a nation be in a state of war with Japan, then the numbers are only 20 nations that declared war and 15 nations that took measures to sever diplomatic ties or terminated foreign relations and trade. Would these nations be included? In addition, on October 31, 1945, the Supreme Commander of the Allied Forces acknowledged 49 nations

as constituting the Allied Powers (2 nations more than the 47 original signatory nations to the Joint Statement of the Allied Powers). Also, the United Nations, which was created by the victor nations, had its start with 51 member nations (Iceland was not a party, but Argentina, Belorussia and the Ukraine did join). As can be seen, it would invite digression to undertake the task of defining "Allied Powers" insofar as the various definitions mentioned would involve a scrutiny of 58 nations. Furthermore, if the San Francisco Peace Treaty is to be interpreted to have vested the Allied Powers with the authority to determine jurisdictional title to Taiwan, then "Allied Powers" under this treaty does not apply to such nations as Poland, Czechoslovakia, the Republic of China, the People's Republic of China, the Union of Soviet Socialist Republics, India, Denmark, Iceland, Yugoslavia or Indonesia.

Therefore, even if the former "Allied Powers" were to determine the jurisdictional title to Taiwan, the task of determining which nations constituted the "Allied Powers" would be highly problematical. However, there is a problem in reaching a settlement on the territorial question if the criteria is to be a war that by now has been relegated to history for half a century, and to have the victors of that bygone war to settle the territorial question according to their will at this point in the present. The international community has experienced roiling changes during this half-century time-frame, and it is obviously inappropriate for these former Allied Powers to undertake the disposition of this problem. In light of this fact, can the "concerned nations" alone unto themselves determine the title to Taiwan without referring to the "Allied Powers"? The "concerned nations" would be limited to the ROC, which in fact controls Taiwan, and the People's Republic of China, which claims Taiwan as its inherent territory. However, the latter has no legal grounds in international law nor historical grounds on which to base its territorial rights to Taiwan, as noted above, and to say that it is sufficient that a

concerned nation assert its territorial authority is an unjustifiable argument. The same can be said for the ROC, although in its case it can base its claims as a concerned nation on its immediate control over Taiwan. In the end, the "concerned nation" can only be the ROC. However, is it justifiable to ignore the will of the inhabitants when determining the territorial title to Taiwan and to have the "nation" or "concerned nation" singly decide the fate of the inhabitants to whom this territory is home?

A number of nations have asserted that the will of Taiwan's inhabitants ought to be respected in determining Taiwan's future, but they have presented no concrete proposals on how this is to be accomplished. In the meanwhile, even these nations have gradually gravitated towards acceptance of the claims by the People's Republic of China due to the logic that it has risen in international stature and is powerful.

The Atlantic Charter of 1941 states that "the nations concerned desire no territorial changes without the free assent of the peoples concerned" which principle was incorporated into Chapter 1 of the United Nations Charter as "respect for the principles of equal rights and self-determination of peoples" and affirmed as a fundamental principle in international relations. Chapter 10 of the UN Charter clearly stipulates that the Charter shall have precedence where a treaty conflicts with the Charter. The conclusion, therefore, would follow that even if the Cairo Statement and the Potsdam Proclamation were determined to be treaties and even if Japan had committed itself in its terms of surrender to the disposition of Taiwan, the disposition of Taiwan is invalid insofar as it is not based on the "free will" of the Taiwanese who are the "peoples concerned" and is thus in violation of the UN Charter as well as the Atlantic Charter.

At the 21st UN General Assembly in 1966, the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights, known as Covenants A and B, were unanimously adopted and Article 1 of each stipulates the following.

"All peoples possess the right to self-determination. Based on this right, all peoples can freely choose their political status and can freely pursue their economic, social and cultural development."

The above two covenants both compose a part of the universal Declaration of Human Rights and clearly affirm the right of peoples to self-determination. The 25th UN General Assembly of 1970 also unanimously decided that "all peoples can decide on their political, economic, social and cultural destiny free of alien interference."

In light of these UN resolutions, the principle of a people's right to self-determination is firmly established in the United Nations. It is clear that the Taiwanese, or the inhabitants of Taiwan, possess the right to exercise their right to self-determination and to determine their own future. The population of Taiwan presently exceeds 20 million people, and there are more than 120 member nations of the UN having smaller populations. It is common knowledge that the economic standing of Taiwan in Asia is only second to Japan's. Is it possible to decide the future of Taiwan by subordinating the will of its inhabitants and ignoring them? However, in 1993, the ROC has in fact claimed Taiwan as its inherent territory and has not denied that it would resort to armed force in order to achieve territorial possession. Engagement in wars has been restricted with the unfolding of the 20th century and the UN Charter widely prohibits the use of armed force including wars, nevertheless, territorial conflicts that are resolved by means of armed force continues even to the present day, needless to say. The following paradigms for the resolution of jurisdictional title to Taiwan including such modes as armed force are considered below.

1) Resolution under the leadership of the People's Republic of China

The People's Republic of China interprets the Taiwan problem as an internal affair and has poured its energies into the

construction of international opinion that will change the interpretation of the international community which holds that the Taiwan problem is an "international problem." Efforts by the People's Republic of China to have international understanding of and even consent to its position that "Taiwan is an inherent territory of China" has been read as a preliminary move towards its future resort to armed force. The ROC has also consistently asserted that "Taiwan is a territory of China" and this, in fact, serves to buttress the claims by the People's Republic of China. The question of Taiwan's territorial problem was never originally a Chinese internal matter, but even if it were conceded to be an internal matter since both the People's Republic of China and the Nationalist government are of the same opinion on this question, does this mean that other nations cannot be involved? That the UN Charter prohibits interference in domestic affairs is undeniable. However, it is not prohibited where it poses a threat to world peace, even in cases of internal matters. The conflicts that have erupted in all parts of the world today serve as testaments. Article 2(7) of the UN Charter states that nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" except upon a finding of a "threat to the peace, breach of the peace, or act of aggression." In the event that armed force is discharged in the Taiwan Straits, it is obvious that this act would pose a threat to world peace and thus the United Nations can take actions to respond to such a situation.

2) Resolution under the leadership of the ROC

Another paradigm is to maintain the present situation without any changes to the ROC's claim to "a single China." An additional paradigm is for the ROC to declare itself as a state that is separate from the People's Republic of China and to clearly indicate, both at home and abroad, that it is a nation whose territory is Taiwan. However, no resolution can be achieved on

the territorial problem based on the former because it offers no means of resolving the territorial proble. In the latter case, too, specifically where there is a declaration of independence by the ROC, we have the fact that the ROC was the state on the Chinese mainland from 1912 to 1949 and, after 1949, has continued to include the Chinese mainland in its claim that "there is only one China." Therefore, any declaration by the ROC would, in essence, be one of independence from "China." A "government" is not bound by duty to recognize "separation and independence." Therefore, it amounts to being nothing more than an attempt by the Nationalist government to elude suppression by the Chinese government.

3) Resolution by self-determination by the people of Taiwan

At the present time, the population of Taiwan exceeds 20 million and its population density is one of the highest in the world. Countries having populations less than Taiwan include the Republic of Austria, Malaysia, the Netherlands and the Democratic People's Republic of Korea, and Taiwan's population exceeds the aggregate populations of 36 UN member nations.

This is not to say that the count of a country's population should be the measure by which to judge whether a peoples can or cannot exercise self-determination, but it is problematical if the will of those living in Taiwan with regards to this question of jurisdictional title to Taiwan is not taken into account given the magnitude of Taiwan's population. A determination of Taiwan's future that is based on the will of the Taiwanese, the inhabitants of Taiwan, not only coincides with the spirit of the United Nation' s Charter, but it is also a right of the peoples of Taiwan as stipulated by the UN Human Rights Declaration. The problem of jurisdictional title to Taiwan can be resolved if the decision on Taiwan's future is determined by the mode of a referendum held in Taiwan because this coincides with the Universal Declaration of Human Rights that was unanimously adopted by the UN General

Assembly. There is no mandatory mode for a referendum. There is no difference between a referendum that is conducted under the leadership of the people of said region and one that is conducted under the leadership of the administration that governs said region. Needless to say, it is imperative that the voting process be monitored by an international body imparted with international objectivity.

1. *Taiwansho Bunkeniinkai hen kan, Zenxiu. Taiwan Tongchikao. Juan-yi. Tudichi Dilipian. Xia* [Taiwan Provincial Documentary Records Committee, editor and publisher, Revised and Enlarged Edition. General Statement on Taiwan Province. Vol. 1. Topography chapter, book 2, final section]. 1966. pp. 357-373.
2. In 1624, D. Wright set foot on Taiwan as a pioneer missionary and noted 11 distinct political units on the main island of Taiwan : 1) Soulang ; 2) Bay of Kabelang ; 3) The King of Middag ; 4) Pimaba ; 5) Sapat ; 6) Takabolder ; 7) Cardeman ; 8) Deredou ; 9) Pukkai ; 10) Tokudekal ; and 11) Perucuzi and Pergnu. Wright described them as *shires, provinces* and *dominions.*
3. TE Tien-Chau, *Taiwan Kokusai Seiji-shi Kenkyū* [Study of Taiwan's International Political History] (Doctoral dissertation). Hosei University Press. pp. 16-18.
4. East India Company's Records, China, Volume 1, p. 140.
5. For further information on the establishment of the Republic of Formosa, refer to Chiao-dong NG, *Taiwan Minshukoku no Kenkyū-Taiwan Dokuritsu Undōshi no Ichi-Danshō* [Study on the Republic of Formosa--A Segment in the History of the Taiwan Independence Movement] (Doctoral dissertation). Tokyo University Press. 1970.
6. KE Shao-wen, *Shin Yuan-shi. Retsuden Dai-*150*-kan.* [New History of the Yuan. Biographies, Vol. 150]. Refer to the section on Ryūkyū (at the time, Ryūkyū referred to the present-day Taiwan).
7. Exemplified by Wen T'ien-hsiang [13th C.] and Yueh Fei [12th C.] who are venerated folk heroes and subjects in spiritual/moral educational materials for children from primary through secondary schools.
8. *Dai-*13 *Kokkai Sangiin Gaimuiinkai Kaigiroku, Dai-*33*-go.* [13th

National Assembly, House of Councilors, Foreign Relations Committee Meeting Records]. No. 33. May 27, 1952. p. 2.

9. *Renmin Ripao. Buotuo Quinluezhe De Falu Waiyi-Shuqing Guanyu Suowei Taiwan Falu Diwei Wenti De Miaolun.* [People's Daily. Deprive the Aggressor's Lawful Overcoat.] January 31, 1955.
10. ZHANG Shi-cheng, *Woguo Dui Taiping Zhi Zhuquan De Falu Yiju.* [The Legal Basis for Sovereignty in Taiwan and the Pescadores]. Also, QU Hong-da, A Study on the Legal Status of Taiwan and the Pescadores. *Dongfang Zachi* [Oriental Magazine]. Reissue Vol. 4, No. 12.

    CHEN Yu-qing, America's China Policy and the Future of Our Country's Renewed Counterattack to the Mainland. *Lian-he Bao. May* 11, 1971.
11. The Ch'ing-Japanese Peace Treaty comprises a total of 11 articles in its contents. The substance of the provisions are outlined as follows.

    Article 1. The Ch'ing state acknowledges *Chōsen* ["Korea"] as a completely independent nation.

    Article 2. The Ch'ing state cedes Taiwan to Japan in perpetuity.

    Article 3. (Deleted)

    Article 4. The Ch'ing shall pay an indemnity of 200,000,000 taels to Japan in installments over a period of 7 years.

    Article 5. The inhabitants of the ceded territory are permitted to evacuate therefrom within 2 years and persons who have not evacuated within this period shall be deemed to be Japanese subjects.

    Article 6. The Ch'ing state shall grant Most Favored Nation Treatment to Japan. In addition, Shashi, Chungching, Suchou and Hangchou shall be newly added as treaty ports. In the treaty ports of the Ch'ing, Japanese subjects may freely engage in the manufacturing industry and may freely import machinery on condition that import duties are paid thereto. All taxation on goods manufactured by the Japanese in the inland areas shall be accorded treatment that

conforms to the case of imported goods from Japan and shall be accorded all preferential exemption rights.

Article 7. The Japanese Army currently stationed in the Ch'ing state shall withdraw within 3 months.

Article 8. To ensure the execution of this Treaty, the Japanese Army shall provisionally occupy Weihaiwei.

Article 9. Prisoners shall be reciprocally released immediately following the exchange of ratification. Persons who were prisoners of Japan and Ch'ing nationals who were affiliated with the Japanese army shall not be subject to the punitive actions of the Ch'ing state.

Article 10. Hostilites shall cease as of the day that ratification is exchanged.

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